

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WILLIAM P. PARTEN,

Appellant,

v.

OLYMPIC AIR POLLUTION CONTROL
AUTHORITY,

Respondent.

PCHB No. 90-8

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This is an appeal of Notice of Violation and Civil Penalty No. 0106 RM, alleging violation of WAC 173-433-150(1)(b) for using a wood stove (solid fuel burning device) during a burning ban.

A formal hearing was held on February 15, 1990 in Lacey, Washington, before the Pollution Control Hearings Board, Member Harold S. Zimmerman, Presiding and Judith A. Bendor, Chair.

Appellant William P. Parten appeared and represented himself. Attorney Fred D. Gentry, of Bean Gentry and Rathbone, represented the Olympic Air Pollution Control Authority ("OAPCA"). The proceedings

1 were tape recorded. Witnesses were sworn and testified. Exhibits
2 were admitted and examined. Argument was made.

3 From the foregoing, the Board makes these:

4 FINDINGS OF FACT

5 I

6 William P. Parten and his wife live at 7115 Timberlake Drive SE,
7 Olympia, and did so on November 30, 1989. On that day, Mr. Parten
8 began a fire in his woodstove using "two sticks" of aged two-year-old
9 fir. No evidence was presented that it was a certified woodstove. He
10 left for work at 7:30 p.m., after listening to a Seattle radio
11 station. He did not hear any announcement of an indoor burn ban. He
12 does not recall if he called any telephone numbers to determine if a
3 ban was in effect.

14 Mrs. Parten was home when he left. She has arthritis and likes
15 heat. Mr. Parten did not know what she did that day. He testified
16 that his air-tight stove can go all day on two sticks of wood.

17 The house is also heated by a natural gas forced-air system and
18 has a fireplace.

19 II

20 On November 30, 1989, OAPCA declared a burn curtailment ("burn
21 ban") for Thurston County, prohibiting indoor burning. The Department
22 of Ecology declared an Episode Forecast Stage at 5:00 p.m, November
23 30, 1989, for Western Washington. Outdoor burning had been banned the
24

1 previous day. (The indoor burn ban was lifted on December 1, 1989 at
2 5:00 p.m.)

3
4 III

5 At 2:00 p.m. on November 30, Robert Moody, an OAPCA woodstove
6 inspector since October 1989, saw smoke coming from the chimney of the
7 Partens' brick house. He took a photograph at 2:01 p.m.

8 IV

9 OAPCA issued Mr. Parten a Notice of Violation and civil penalty
10 for \$25 with the penalty suspended on the condition no further
11 violations occur. The Notice alleged violation of WAC
12 173-433-150(1)(b), the burn ban. Mr. Parten appealed to this Board
13 which became PCHB No. 90-8.

14 V

15 To inform the public about a burn ban, OAPCA called six local
16 radio stations at 9:00 a.m., so that stations made announcements by
17 9:15 a.m. Two recorded messages were available at toll-free telephone
18 numbers, also stating what the burn situation is. The Department of
19 Ecology also had a toll-free 800 number to provide burn information.

20 The local newspaper might print information on the indoor ban,
21 but this information is usually one day late. The previous day's
22 outdoor ban had been announced by the local radio stations, and was in
23 the Olympia paper on November 30, 1989. Mr. Parten was aware of the
24 outdoor ban before he left for work. He conceded that the previous

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(3)

1 day's outdoor ban should have caused him to be alert to the
2 possibility of an indoor ban the next day.

3 VI

4 OAPCA did not (and does not) enforce an indoor ban until 12:00
5 noon of the first day, giving the public time to be aware of the ban
6 and to have the fires burn out.

7 VII

8 We find that it is more probable than not that those two sticks
9 of wood were not the source of the smoke seen almost seven hours
10 later. Mr. Parten did not prove that no fuel was added after he left
11 and once the burning ban began.

12 VIII

13 Any Conclusion of Law which is deemed a Finding of Fact is hereby
14 adopted as such.

15 From these Findings of Fact, the Board makes these:

16 CONCLUSIONS OF LAW

17 I

18 The Board has jurisdiction over these parties and these matters.
19 Chapters 70.94 (Clean Air Act) and 43.21B RCW.

20 II

21 The Clean Air Act enunciates the basic State policy applicable in
22 this case:

23 Limitations on burning wood for heat. Any
24 person in a residence or commercial establishment

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(4)

1 which has an adequate source of heat without burning
2 wood shall:

3 (1) Not burn wood in any solid fuel heating device
4 whenever the department has determined under RCW
5 70.94.715 that any air pollution episode exists in
6 that area;

7 (2) Not burn wood in any solid fuel heating
8 device, except wood stoves which meet the standards
9 set forth in RCW 70.94.457, in the geographical area
10 and for the period of time that impaired air quality
11 has been determined, by the department or any
12 authority, for that area. [. . .] RCW 70.94.473.

13 III

14 WAC 173-433-150 provides detailed regulations to enforce the
15 Clean Air Act.

16 It states:

17 WAC 173-433-150 Curtailment. (1) A person in a
18 residence or commercial establishment with an adequate
19 source of heat other than the burning of solid fuel
20 shall not burn solid fuel in any solid fuel burning
21 device:

22 (a) Whenever the department has declared an air
23 pollution episode for the geographical area pursuant
24 to chapter 173-435 WAC; or

25 (b) Whenever the department or an air authority
26 has declared impaired air quality for the geographical
27 area, except when the solid fuel burning device is
certified under WAC 173-433-100.

(2) A person responsible for a solid fuel burning
device already in operation at the time an episode is
declared shall extinguish that device by withholding
new solid fuel for the duration of the episode. A
person responsible for a solid fuel burning device
that is not certified under WAC 173-433-100 already in
operation at the time impaired air quality is declared
shall extinguish that device by withholding new solid
fuel for the duration of the impaired air quality.
Smoke visible from a chimney, flue or exhaust duct
after a time period of three hours has elapsed from
the time of declaration of the episode or impaired air

1 quality shall constitute prima facie evidence of
2 unlawful operation of an applicable solid fuel burning
3 device. This presumption may be refuted by
4 demonstration that the smoke was not caused by an
5 applicable solid fuel burning device.

6 IV

7 We conclude that OAPCA has established a prima facie case that
8 violation occurred, since smoke was visible more than three hours
9 after the ban was in effect. The burden then shifts to Mr. Parten,
10 who has not proved that wood was not added after 9:00 a.m.

11 V

12 Appellant claims that he is not liable because notice of the ban
13 was inadequate.

14 We conclude that the public notice was sufficient to withstand a
15 legal challenge. OAPCA has responsibility for a vast, six-county
16 area. In this case, it used the radio stations local to the ban
17 area. Moreover, telephone numbers were available for people to call.

18 Individualized notice cannot be expected. As to newspaper
19 notification, OAPCA cannot always predict the meteorological condition
20 a day in advance in time for their deadlines.

21 However, in the future, OAPCA might consider further improving
22 its notice, such as by possibly including some Seattle radio stations
23 commonly listened to by residents, and by ensuring that adequate
24 telephone lines are available.

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VI

The appropriateness of the amount of a civil penalty is a matter involving consideration of factors bearing on reasonableness including:

- (a) nature of the violation;
 - (b) prior behavior of the violator;
 - (c) actions taken after the violation to solve the problem;
- Georgia Pacific v. DOE, PCHB No. 87-45 (1988).

In this case, appellant has pointed out the difficulties of notice for persons leaving for work before 9:00 a.m., the fact he has not had any previous violations, and he has made recommendations regarding safety of extinguishing fires in airtight stoves, all toward the aim of preventing or solving future problems.

CAPCA apparently recognized some of these factors by suspending the penalty in its entirety.

VI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

1 ORDER

2 Notice of Violation is AFFIRMED. The suspension of the \$25
3 penalty for the permit violation is AFFIRMED, but modified as
4 follows: provided that there is no future burn ban violation for a
5 year from the date of this Order.

6 DONE this 12th day of March, 1990.

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8 POLLUTION CONTROL HEARINGS BOARD

9 Harold S. Zimmerman
10 HAROLD S. ZIMMERMAN, Presiding

11 Judith A. Bendor
12 JUDITH A. BENDOR, Chair

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